

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY WEBSTER,

Defendant-Appellant.

UNPUBLISHED

June 29, 2010

No. 287478

Wayne Circuit Court

LC No. 08-002440-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, four counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, 20 to 30 years' imprisonment for each of the assault with intent to murder convictions, three to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Because defendant was not denied his right of confrontation and because the trial court's questioning of witnesses did not pierce the veil of judicial impartiality, we affirm.

Defendant's convictions stem from his reaction to the stray comment, "Hey White Girl," that was uttered toward his girlfriend as she and defendant drove through a crowd of people on Lesure Street in Detroit. Shortly after the comment was made, defendant returned to Lesure Street with a gun and began shooting into the crowd. Four persons suffered nonfatal gunshot wounds and one person was killed by a gunshot to the head.

At trial, defendant presented an insanity defense. In response to the evidence presented by defendant, the prosecution called Dr. Donna Kelland, a clinical neuropsychologist employed at the Center for Forensic Psychiatry, who conducted a criminal responsibility examination of defendant.

I. TESTIMONIAL HEARSAY

On appeal, defendant argues that the trial court erred by permitting Kelland to testify regarding portions of a report from Dr. James Watson, who did not testify at trial, because the report from Watson was testimonial hearsay and Watson was never previously cross-examined.

Defendant contends that this evidence impacted the jury's verdict because the question of whether he was malingering was crucial to the consideration of his insanity defense. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant failed to object to Kelland's testimony on the ground of a Confrontation Clause violation; thus, contrary to defendant's position, the issue is not preserved. We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" US Const, Am VI; see also *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A testimonial statement of a witness absent from trial is only admissible if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009). The United States Supreme Court declined to provide a comprehensive list of what constitutes testimonial statements, *Crawford*, 541 US at 68, but recognized that it includes "pretrial statements that declarants would reasonably expect to be used prosecutorially" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *id.* at 51-52 (quotations omitted); see also *People v Lonsby*, 268 Mich App 375, 391; 707 NW2d 610 (2005) (opinion by SAAD, J.).¹

In the instant case, defendant, who raised an insanity defense, contends that Kelland, who performed a court ordered psychological evaluation of defendant regarding criminal responsibility, improperly testified under questioning by the prosecutor about a prior incomplete evaluation by Watson. The relevant testimony is as follows:

Q. [W]hat did you review in terms of what did you have to do to do your analysis or your examination of Mr. Webster? What did you have to do?

A. Well, as part of the criminal responsibility evaluation . . . my ultimate job basically is to form an opinion about the individual's state of mind at the time of the alleged wrongdoing. So, basically whatever information . . . that's available to be able to kind of try to piece together what's going on at that point in time.

This was a continuation of the Defendant's first referral to the forensic center. He had been seen in January of this year by another examiner on the same -- on a competency and a criminal responsibility order. But at that point

¹ The other two judges in *Lonsby* concurred in the result only.

in time the criminal responsibility opinion wasn't offered because the Defendant was not -- was viewed as not cooperating with the evaluation.

Q. I don't mean to cut you off.

He saw another doctor before you?

A. Yes.

Q. And he was viewed as not cooperating with the examination?

A. Yes.

Q. Was there a determination at that point of malingering or anything at that point?

A. It was viewed -- his lack of cooperation was viewed as deliberate or under volition or control. It wasn't that -- he was not viewed as unable to participate in the evaluation, but rather that he was not cooperating. And Dr. Watson noted in his report that he thought that he was --

* * *

Q. So Dr. Watson did [an] evaluation. He made a determination, correct, as to what Mr. Webster was doing?

A. In terms of his clinical presentation, yes. He offered an opinion that Mr. Webster was deliberately not cooperating with the evaluation.

Q. Okay. So the evaluation was discontinued at that point, at some point that it could not be completed?

A. The criminal responsibility component could not be completed.

Q. Based on that then you?

A. So we -- Dr. Watson issued a report to the court that Mr. Webster, you know, opted not to participate in the criminal responsibility evaluation so he couldn't offer an opinion. He did offer the other opinion as requested by the court. Then the forensic center was contacted in early June to ask about the evaluation, the opinion that was not offered earlier and could we attempt another evaluation under the original court order. And so we agreed to do that.

In *Lonsby*, the testimony of one analyst was offered for the purpose of introducing the laboratory report, findings, and conclusions of a different, nontestifying analyst. Judge Saad concluded that the inculpatory laboratory report, prepared by the nontestifying analyst, constituted testimonial hearsay within the meaning of *Crawford*. *Lonsby*, 268 Mich App at 392-393. Judge Saad wrote that because there was "no showing that [the nontestifying analyst] was

unavailable to testify and that [the] defendant had a prior opportunity to cross-examine her, the admission of the evidence violated [the] defendant's Confrontation Clause rights." *Id.* at 393. He reached this conclusion because the testifying analyst had no firsthand knowledge of the analysis performed or of conclusions of the nontestifying analyst and the defendant was not able to challenge the objectivity of the nontestifying analyst or the accuracy of her observations and methodology. *Id.* at 392.

Moreover, in *Melendez-Diaz v Massachusetts*, 557 US ____; 129 S Ct 2527, 2531-2532; 174 L Ed 2d 314 (2009), the United States Supreme Court held that "certificates of analysis" which it considered to be affidavits, showing the results of forensic testing, were testimonial statements, and that without showing that the forensic analysts was unavailable to testify at trial and that the defendant had a prior opportunity for cross-examination, the defendant was entitled to be confronted with the forensic analysts responsible for the certificates of analysis as witnesses at trial.

However, unlike the evidence in *Melendez-Diaz*, the disputed evidence in this case does not constitute testimonial hearsay. Rather, it was background evidence regarding the circumstances under which Kelland conducted her evaluation. Kelland explicitly testified that Watson was unable to reach an opinion on criminal responsibility because defendant was intentionally uncooperative. Defendant attempts to conflate a characterization of him malingering with a characterization of him acting uncooperatively. Although suggested in the prosecutor's questions, Kelland did not testify that Watson viewed defendant as malingering. Rather, Watson could not reach an opinion because defendant did not cooperate in the evaluation. In rendering her own independent opinion about whether defendant was malingering, Kelland testified, "I review[ed] the records, I reviewed previous testing, I reviewed the testing that I gave him and I did you know, conclude that there was evidence of malingering of memory impairment"

This case is distinguishable from *Lonsby* because here Kelland testified that she independently reviewed the case file and she was examined about her own opinions and conclusions, not those of Watson. Further, the record reflects that Kelland even consulted with Watson. *Melendez-Diaz* is also distinguishable from this case because, rather than simply reading a report into evidence, Kelland testified at trial and Watson's report was not read into evidence. Kelland also reviewed all the relevant tests and records, offering her own independent interpretation of that information.

In addition, Kelland was not merely a conduit for Watson's findings. See *United States v Johnson*, 587 F3d 625, 635 (CA 4, 2009) (holding that the question when applying *Crawford* to expert testimony is "whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay"). Again, the evidence did not show that Watson determined that defendant was malingering. The portion of Watson's report that Kelland revealed merely showed that Watson viewed defendant as intentionally uncooperative, which left him unable to render an opinion on criminal responsibility. Kelland analyzed the tests conducted on defendant, and testified regarding her independent opinion about whether defendant was malingering. Thus, because Kelland was subject to cross-examination at trial, there was no Confrontation Clause violation. Therefore, defendant has not shown plain error because he was not clearly and obviously denied his right of confrontation. *Carines*, 460 Mich at 763.

II. QUESTIONING BY THE TRIAL COURT

Defendant also argues that the trial court's questioning of defense witnesses gave the jury the impression that the trial court favored the position of the prosecution. Defendant contends that the trial court's questioning constitutes plain error and affected the fairness and integrity of the verdict because the trial court's apparent skepticism regarding his insanity defense tainted the jury's verdict. We disagree. Because defendant did not object to the trial court's conduct, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"A defendant in a criminal trial is entitled to expect a neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (quotation omitted). Although a trial court may question a witness in order to clarify testimony or to elicit additional relevant information, MRE 614(b); *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992), the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial, *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). "The principle limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996).

"The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Cheeks*, 216 Mich App at 480. This Court has also stated that "[a]s long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality . . . a trial court is free to ask questions of witnesses that assist in the search for truth." *Davis*, 216 Mich App at 52.

Defendant cites several examples of instances where the trial court intervened and began questioning witnesses. The first two instances occurred during the testimony of defendant's grandmother and his aunt. As the prosecution argues, and the record reflects, the trial court's questioning of these witnesses focused on the crux of the factual issue in this case by addressing defendant's behavior when he was agitated and how he would react with people after his previous head injuries. These were relevant inquiries because defendant had placed his mental state in question.

Defendant also raises instances where the trial court intervened during defense counsel's questioning of his expert witness, Dr. Firoza Van Horn. Again, as the prosecution argues, and the record reflects, the trial court sought clarifications or to elicit details about defendant's mental state from Van Horn, whose testimony the trial court viewed as confusing or unexamined. Defendant also complains that the trial court did not permit Van Horn to fully explain post-traumatic stress disorder and also interrupted defense counsel and criticized his questioning of Kelland. However, the record reflects that the trial court was merely attempting to focus defense counsel on the relevant issues in the case.

Thus, after reviewing the record, we conclude that the trial court's questions did not unjustifiably arouse suspicion in the mind of the jury concerning credibility of the witnesses, nor did they express partiality to defendant's detriment. Rather, the trial court's questions were posed in a neutral manner and do not suggest that the court believed or preferred one party over

the other. Further, the trial court's questions neither added to nor distorted the evidence previously introduced by the parties. Rather, the questions clarified issues of confusion or focused attention on relevant issues. In addition, the questions posed by the trial court would have been appropriate if asked by either party.

Under these circumstances, the trial court's questioning of the witnesses was appropriate and, therefore, did not pierce the veil of judicial impartiality. Moreover, contrary to defendant's argument, because the trial court did not err in questioning the witnesses, defense counsel's failure to object to the trial court's questioning did not constitute ineffective assistance of counsel. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis